Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–489 OF 1999
SHAIK DAUD, DENIS ONG AND HAIDAR JJCA
13 NOVEMBER 2000

Arbitration *— Stay of proceedings — Steps taken in proceedings — Satisfaction of criteria of s 6 of Arbitration Act 1952 — Whether finding of unconditional appearance amounts to taking steps in proceedings — Arbitration Act 1952 s 6*

The first respondent engaged the appellant to carry out earthworks pursuant to a contract dated 30 October 1996. The appellant claimed against the first respondent a sum of RM17,459,445.69 allegedly for earthworks done by the appellant under the contract. This was disputed by the first respondent and it applied for stay of the proceedings to the High Court in Shah Alam, pursuant to s 6 Arbitration Act 1952 (the 'Act'), to bring the matter for arbitration in accordance with the terms of the contract. The appellant opposed the application for stay citing, inter alia, that the first respondent had taken steps in the proceedings by filing an unconditional appearance. The High Court held that the filing of an unconditional appearance did not amount to a waiver in the defendant's (first respondent) right to arbitration [1999] 2 MLJ 609. The appellant appealed.

Held, allowing the appeal with costs:
The first respondent entered an unconditional appearance and therefore lost its right to rely on s 6 of the Act to move the court to stay the action. On this score alone, the court allowed the appeal with costs here and below to be paid by the first respondent, and the court set aside the order of the High Court (see p 388F); *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 followed.

[Bahasa Malaysia summary

Responden pertama telah melantik perayu untuk menjalankan kerja tanah menurut perjanjian yang bertarikh 30 Oktober 1996. Perayu menuntut sejumlah wang sebanyak RM17,459,445.69 untuk kerja tanah yang dilaksanakannya menurut perjanjian tersebut. Ini telah dipertikaikan oleh responden pertama dan responden pertama telah memohon kepada Mahkamah Tinggi Shah Alam untuk penggantungan perbicaraan menurut s 6 Akta Timbangtara 1952 ('Akta tersebut') untuk mengemukakan perkara tersebut kepada timbangtara menurut perjanjian tersebut. Perayu membantah kepada permohonan tersebut dengan menyatakan, inter alia, bahawa responden pertama telah mengambil langkah dalam perbicaraan dengan memasukkan kehadiran tanpa syarat. Mahkamah Tinggi telah memutuskan bahawa kemasukan kehadiran tanpa syarat bukan

merupakan penepian hak defendan (responden pertama) kepada timbangtara. Perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut dengan kos:

Responden pertama telahpun memasukkan kehadirannya dan, dengan itu, telah melucutkan haknya untuk bergantung kepada s 6 Akta tersebut, untuk memohon kepada mahkamah supaya menggantungkan perbicaraan tersebut. Di atas sebab ini, mahkamah membenarkan rayuan ini dengan kos yang ditanggung di mahkamah ini dan di Mahkamah Tinggi ditanggung oleh responden pertama, dan perintah Mahkamah Tinggi diketepikan (lihat ms 388F); *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 diikut.]

Notes

For cases on stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529 (folld)

Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Appeal from: Civil Suit No S2–22–42–98 (High Court, Kuala Lumpur)

CC Choo (*Hazila Moharam* with him) (*CC Choo & Co*) for the appellant.

Loh Siew Cheang (*Chua Eng Siong* with him) (*Cheang & Ariff*) for the first respondent.

Maidzuara bte Mohamed (*Rohan Sankey* with her) (*Logan Sabapathy & Co*) for the second respondent.

Shaik Daud JCA (delivering judgment of the court)**.** : The first respondent engaged the appellant to carry out earthworks upon the terms and conditions of a contract dated 30 October 1996 ('the contract') between them. Clause 41 of the said contract provides for the arbitration of disputes and/or differences arising between the parties to the contract. The said clause provides:

> If the parties do not reach such amicable solution within 14 days from the request sent by any party to the other party to start the above negotiations, then the disputes shall be finally settled by arbitration, pursuant to s 41 below. Arbitration
>
> (a) If any dispute or differences shall arise between the client and the earthworks contractor, either during the progress or after completion of

the works, or after the termination of the earthworks contractor's employment, or breach of this contract, as to:

(i) the construction of this contract, or

(ii) any matter or thing of whatsoever nature arising under this contract, or then such dispute or differences shall be referred to the Regional Centre for Arbitration at Kuala Lumpur (the 'Arbitrator') for a decision … .

The appellant claimed against the first respondent a sum of RM17,459,445.69, allegedly owed by the first respondent to the appellant for earthworks performed under the said contract. The first respondent disputed the claim. The first respondent applied to the High Court for a stay of the proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act'). The High Court rightly held that there are four requirements to be satisfied before a stay could be granted under s 6 of the Act, and the requirements are:

(a) that legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration.

(b) that no other steps in the proceedings be taken before the making of the application for stay.

(c) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties.

(d) that the applicant was at the time of the application, and remains ready and willing to do all things necessary for the proper conduct of the arbitration.

In opposing the application for a stay, the appellant raised four issues, namely that:

(a) there is no dispute as the first respondent had acknowledged that there was a debt due and owing by the first respondent to the appellant,

(b) that the disputed relief sought was not within the terms and scope of the arbitration clause,

(c) there would be multiplicity of proceedings, and

(d) that the first respondent had taken steps in the proceedings by filing an unconditional appearance.

This appeal, in fact, centres on issue (d) above. As can be seen from s 6 of the Act above, one of the conditions for a stay of proceeding, is that the party seeking a stay must not have taken 'any other steps in the proceedings' before it applied for the stay. In the present case an unconditional appearance was entered. The sole issue is whether the filing of an unconditional appearance is a step in the proceedings, and if so the stay ought not to have been allowed. There are several cases which held that the entering of an unconditional appearance is not a step in the proceedings. In *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691, after reviewing all such cases the High Court came to the conclusion that the entry of an

unconditional appearance is a step in the proceedings. In the present case, the High Court found no favour in the decision in *Usahabina* but held that 'the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration …'. When the decision in the present case was arrived at, the High Court had only the benefit of the *Usahabina*'s decision at first instance. Since then the Court of Appeal had concluded that *Usahabina* was rightly decided. In *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 at p 534, the Court of Appeal states thus:

> Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decisions of Malaysian Courts that held the entry of an unconditional appearance not to amount to a step in the proceedings did so by acting upon English cases without properly appreciating that the two provisions (s 6 of the Act and s 4(2) of the United Kingdom statute) are differently constructed.
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> After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina v Anuar bin Yahya* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s 6 of the Act. I find it unnecessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in *Usahabina*. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s 6 of the Act, he must enter a conditional appearance before moving the court.

The High Court in the present case did not have the benefit of the subsequent judgment of the Court of Appeal in *Interscope* when it decided on the same issue. Until overruled by the Federal Court, this Court is bound by its own decision in *Interscope*. As stated earlier in the present case, the first respondent entered an unconditional appearance, therefore it lost its right to rely on s 6 of the Act, to move the court to stay the action. On this score alone, we allowed the appeal with costs here and below to be paid by the first respondent, and we set aside the order of the High Court. We also ordered the deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Chew Phye Ken